

***United States Court of Appeals
for the Second Circuit***



APPENDIX

DOCKET No. 75 - 1053

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,
Appellee

vs.

ERNEST HARVEY, JUNIOR,
Appellant

On Appeal from the United States District Court
for the District of Vermont

APPELLANT'S APPENDIX E

Bennett E. Greene, Esquire
Attorney for the Defendant-Appellant,
Appointed

(EXCERPTS FROM TRANSCRIPT OF TRIAL — TESTIMONY,
AND CONFERENCES AT BENCH AND IN CHAMBERS)

8

PAGINATION AS IN ORIGINAL COPY

MYNCZYWOR - direct - Cook

- 1 A. Yes, I did.
- 2 Q. Did you subsequently have it typed up or prepared?
- 3 A. I typed it as he dictated it to me.
- 4 Q. And was it then signed by Mr. NUTBROWN?
- 5 A. Yes, it was.
- 6 (GOVERNMENT'S "5", STATEMENT OF BYRON NUTBROWN, DATED
- 7 8/4/73 MARKED FOR IDENTIFICATION)
- 8
- 9 Q. I show you Government's "5", Officer MYNCZYWOR, which
- 10 appears to be in four pages; can you tell me what
- 11 Government's "5" is, and will you make reference
- 12 to each page as you tell me?
- 13 A. It's a voluntary statement form we have in the
- 14 Newport Police Department advising a subject of
- 15 his rights.
- 16
- 17 Q. Is that the first page?
- 18 A. This is the first sheet.
- 19 Q. And does anybody's signature appear on the first sheet?
- 20 A. Yes, mine and NUTBROWN's and the subject, Mr. MASSEY.
- 21 Q. And can you tell me who Mr. MASSEY was?
- 22 A. He was our dispatcher.
- 23 Q. And would you look at the second page; will you tell
- 24 me what that is?
- 25 A. That is just a copy of the first page.
- 26
- 27 Q. And then will you look at the third page and tell me

MYNCZYWOR - direct - Cook

Q. Do you know - you've already described Sgt. WADE took a sample of the substance in the brown paper bag?

A. That's right.

Q. Do you know whether or not that the, that one of the items which was delivered to you the following day at Lavalley's, was that taken at the same time by Sgt. WADE, as the substance?

A. Yes, it was.

MR. COOK: At this time, Your Honor, we offer "3", "4" and "5". In conjunction with "5", which I'd like to show the Court as well as opposing counsel, we have filed a memorandum of law in conjunction with it.

THE COURT: Well, show it to counsel. Counsel want to come to the Bench?

MR. GREENE: With the material, Your Honor?

(OFF RECORD)

(COUNSEL RETURNED TO NORMAL SEATS)
THE COURT: No.

(AT THE BENCH OUT OF HEARING OF THE JURY)

MR. COOK: Your Honor, it's come to our attention, when I asked the officer to look into the bag, there was one item that he didn't identify, it was just overlooked at the time, and I wonder if he could have it reidentified and offer it along with the contents of the bag?

MYNCZYWOR - direct - Cook

1 (JURY AND WITNESS EXCUSED AND WITHDREW FROM COURT ROOM)

2 (4:30 p.m.)

3 THE COURT: All right, Mr. GREENE, we'll
4 hear you in regard to your objections as to "5".

5 MR. GREENE: Our objections to
6 Government's "5", Your Honor, are firstly, I've seen the
7 first of the four sheets of Government's "5" for identifica-
8 tion, is a so-called document entitled "A Voluntary Statement",
9 that's the title of it, and it has three signatures on it.
10 We understand from the testimony of the last witness that
11 he took the statement from what appeared to him to be
12 a young boy, approximately fifteen years of age, fourteen
13 or fifteen years of age. Now, firstly, we don't agree that
14 if the boy was fourteen or fifteen years of age, if the
15 individual who did sign this document was fourteen or
16 fifteen years of age, that that person was incapable of
17 giving his consent thereto; no one has introduced any
18 evidence to show that he had a parent-guardian, guardian
19 ad litem, or other adult representation at the time. And
20 therefore, we feel that the top document, and the document
21 which purports to be a copy of it, should not be admitted
22 because it was not properly obtained, it's tainted evidence,
23 and tainted evidence should not be used to the Government's
24 advantage in any case.
25
26
27

MYNCZYWOR - direct - Cook

1 THE COURT: Tainted in the sense that
2 there was no guardian ad litem or..

3 MR. GREENE: Tainted in the sense that
4 if was, if it's to have any meaning at all, we expect it
5 was signed by a person with capacity to reach this agreement
6 and to volunteer these statements. We understand that if
7 the individual who did sign it was under age with no parent,
8 no guardian ad litem, no guardian, no lawyer, no adult
9 representative present, that the person was not even capable
10 of giving this any legal effect anyway, but even if it were,
11 we submit that it has no bearing on this particular case.
12 And we have no indication and insufficient testimony to
13 show just how voluntary it really was.
14

15 Now, the next two items, the last two
16 pages of Government's "5" for identification, purports to
17 be, according to the printed title on top, A Statement Of,
18 and then the words appear, Byron NUTBROWN III, and after
19 that D.O.B., which we submit means date of birth, 7/11/58.
20

21 At the bottom of the page, again is a
22 signature and whoever signed it, the signature says
23 Byron NUTBROWN III, and the last page or fourth page of
24 this Government's "5" for identification, purports to be
25 a no guardian required copy of the page I've just described.
26

27 And again, we see that if this statement

MYNCZYWOR - direct - Cook

1 were - we don't agree that it was, but if the statement
2 were really taken from the youth alleged to have been
3 born on 7/11/58, that this again is tainted evidence and
4 that it should not be used to the advantage of the Govern-
5 ment in this case because it was improperly obtained.

6 We say further that this statement
7 does not have evidentiary value, but if it were believed
8 by the Court or jury or both, to be the actual words of
9 Byron NUTBROWN III, and that has not been demonstrated,
10 but even if it were, this is hearsay evidence only, with
11 a very, very poor foundation that this was what was actually
12 said. The officer, as a matter of fact, stated that he
13 typed the statement, and we feel that there's no foundation
14 for it whatsoever.

15 THE COURT: Have you had the opportunity
16 to read the memorandum on this point that's been submitted
17 by..

18 MR. GREENE: When the memorandum was
19 handed to me, Your Honor, I was busy reading the grand
20 jury minutes in preparation for a witness, PATTEN. However,
21 I read the first paragraph and just made notes to myself
22 that the Government's claim is that it's important to
23 demonstrate what Byron NUTBROWN III, had as a, quote, state
24 of mind, or something to that effect.

MYNCZYWOR - direct - Cook

1 Now, we feel that the state of mind of
2 Byron NUTBROWN III, is not relevant. We feel that the
3 Government is attempting to prove the motive of the
4 defendant, and I suppose co-conspirators as well, by showing
5 what someone else had allegedly on his mind. Now, there's
6 no connection; that doesn't make any sense whatsoever. I
7 see no way in which the proof of - if it is proof - of the
8 state of mind that Byron NUTBROWN III, serves to prove the
9 motive of Ernest HARVEY or Gerald DUNHAM or anyone else
10 named by the Government.
11

12 THE COURT: Do you disagree with the
13 authority cited by the Government?
14

15 MR. GREENE: Having seen them for the
16 first time here and not having read them, Your Honor, one
17 of them has the citation in U.S. but no page or volume.
18 We have not had a chance to read them and for no other
19 reason, we will object to the reasoning of those and that
20 they apply to this case.

21 THE COURT: Mr. GRAY or Mr. COOK, do
22 you wish to respond?
23

24 MR. GRAY: Your Honor, first a minor
25 point; we do not have a U.S. cite, and we do not have U.S.
26 reports, and this is the Supreme Court Advance Sheet, and if
27 we've had a U.S. cite, we would have put it in. We do,

MYNCZYWOR - direct - Cook

1 the record will show, cite the Supreme Court case, the best
2 we had at the time.

3 First point, with respect to the
4 question of voluntary of a statement, I've submitted that
5 it's totally irrevelant to its admissability at this time,
6 but even so, that the record of this Court would show that
7 the statement was given after warning, and I hate to even
8 get into the argument because I don't think it has anything
9 to do with it. I don't think Mr. HARVEY, even though it
10 were involuntary, would have the right from standing to
11 object to admit on that ground. If Byron NUTBROWN is the
12 victim, he's not on trial here and so whatever may have
13 been his state of mind when he gave the statement, voluntar-
14 ily or not, I submit that it's not totally relevant and I
15 don't think Mr. GREENE can find any authority for the ground
16 that the statement should be suppressed even though his
17 client's cause even the alleged involuntariness of the
18 person who gave it.

21 The more important point we submit is,
22 the question of its relevance and whether it violates the
23 rule against hearsay. We would submit first, that it's
24 relevant for two purposes, and I'm taking the second one
25 first, was the one Mr. GREENE mentioned, that is motive.

27 Motive, I would submit, is the

MYNCZYWOR - direct - Cook

1 secondary issue to which this is relevant. It can show, I
2 think the motive of the defendant is silencing of
3 Mr. NUTBROWN. More important, however, is that it's relevant
4 to show that what Mr. NUTBROWN knew and, or stated he knew,
5 that what Mr. NUTBROWN was in a position to testify to with
6 respect to the events of that day, and as Your Honor knows,
7 the theory of Count 6 and the charge contained in Count 6
8 is that he was a witness to federal offenses and it seems
9 to me this statement is relevant to prove that.
10

11 Now, to the extent we're arguing that
12 it's not hearsay because it's not admitted for the truth of
13 the material contained in the statement, and along that
14 line, if Your Honor does admit it, and we certainly
15 hope you do, because it's very important to the case we
16 have and we have no objection to an instruction to the
17 jury that this statement is not to be considered as evidence
18 with respect to Counts one through five, evidence whether
19 Mr. HARVEY did or did not participate that day, that they
20 are to judge that only on the basis of the other testimony
21 they will hear here.
22

23 It is relevant only, we submit, on
24 Count 6, to show what Mr. NUTBROWN was in a position to say,
25 and we submit that it's admissable for that purpose.
26

27 THE COURT: Mr. GREENE?

MYNCZYWOR - direct - Cook

1 MR. GREENE: Your Honor, in this trial
2 memorandum to which reference has been made, I wish to
3 quote one sentence regarding these statements. It says,
4 and I quote, "They are not offered for the truth of the
5 matter contained in the statements, but rather to demon-
6 strate NUTBROWN's knowledge of the alleged facts relevant
7 to potential federal investigations."
8

9 Now, firstly, it seems impossible, it
10 is impossible for me to believe that this statement, if
11 admitted and shown to the jury, would not have an effect
12 on their determination of the truth of the matter. That
13 is number one. Number two, the Government admittedly has
14 not offered for the truth of the matter, but to demonstrate
15 NUTBROWN's knowledge of alleged facts, and we submit that
16 NUTBROWN's knowledge of alleged facts is not an issue in
17 this case. As a matter of fact, counsel has stated that
18 Byron NUTBROWN III is not on trial here; he is the alleged
19 victim of the crime, which has also been alleged, and his
20 knowledge has no effect here at all. Had, had, there's no
21 foundation to show that this statement fell into the hands
22 of any of the co-conspirators as alleged, or the defendant
23 in the case. It has no bearing on their motive whatsoever.
24 It has no bearing on what they did, or if they did something,
25 why they did it, so therefore, we feel that the cases
26

MYNCZYWOR - direct - Cook

1 regarding what is and what isn't hearsay, don't even apply
2 to this matter. It's just not relevant. Because it, if
3 it shows anything, it shows something that NUTBROWN knew,
4 or said he knew. And does not show something that the
5 defendant knew or could have known from this piece of
6 evidence.

7
8 But we also wish to restate that we
9 do not abandon our argument that it is tainted because it
10 was improperly obtained and should not be used to Government
11 advantage.

12 THE COURT: The Court will examine the
13 proposed exhibit over the evening and rule on it in the
14 morning. And if you want to examine the cases cited by
15 the Government, can do so, and we'll ask counsel to come to
16 me in Court by 9:15 so we can have any further discussions
17 of it.

18
19 Now, one further thing. Well, I guess
20 that's all. Do you have it, Mr. GREENE, do you have the
21 statement?

22 MR. GREENE: The actual thing marked as
23 Government's "5", Your Honor?

24 THE COURT: Yes.

25 MR. GREENE: Yes, I do.

26 THE COURT: You want to give it to me?

MYNCZYWOR - direct - Cook

1 the next witness we expect to call is Barbara NUTBROWN. I
2 think I've advised you previously, I'm not sure, but it
3 was within the material given this morning, given earlier.
4 These gentlemen, WEST and WADE, I would expect to be called
5 probably after the noon recess.

6 MR. GREENE: All right, I have read
7 only some of the material regarding Mrs. NUTBROWN, Your
8 Honor, but I'm sure if it comes up to the lunch hour, I can
9 read them.

10 MR. COOK: We do take the position that
11 nearly all of that material is not 3500 material, but we
12 don't want to be overcautious. We think the interviews of
13 most of the witnesses, which is really quite material.

14 THE COURT: Okay, put the "show" on
15 the record. (9:37 A.M.)

16 (IN THE COURT ROOM WITH THE JURY PRESENT, 9:42 A.M.)

17 THE COURT: The Court is going to admit
18 Government's "5". I have it here, Mr. LAFAYETTE. And,
19 ladies and gentlemen, the Court is admitting Government's "5"
20 solely in connection with Count 6 of the indictment, and
21 not in connection with the first five counts.

22 You will recall that Count 6 is a
23 count which it alleges deprived Byron NUTBROWN III of his
24 civil rights, and the first five counts generally have to

MYNCZYWOR - direct - Cook

1 do with the transportation of dynamite in interstate
2 commerce in receiving and concealing, transportation of
3 dynamite knowing it to have been stolen, in connection
4 with the conspiracy of transporting stolen property, and
5 also, one, I guess, the first count has to do with the
6 conspiracy as transporting the proceeds of the burglary
7 and receipt and transportation of dynamite.
8

9 Now, Government's Exhibit "5" is a
10 statement of Byron NUTBROWN III which the police officer
11 testified about yesterday. The Court is admitting this, not
12 for establishing the truth of those matters which are set
13 forth on the statement, but solely on the issue of knowledge
14 and awareness of which Byron NUTBROWN may have had as to
15 relevant events involving Mr. HARVEY in connection with
16 Count 6. I want to stress that you can not use this
17 statement for any purpose or in any way with reference to the
18 guilt or innocence of Mr. HARVEY as far as Counts one through
19 five are concerned, and only for the limited purpose in
20 connection with Count 6, that is as I have just explained
21 it to you.
22

23 All right, Mr. COOK?

24 MR. COOK: I don't think I've rested
25 with regard to Officer MYNCZYWOR. I only have a couple
26 more questions.
27

NUTBROWN - direct - Gray

1 Q. Mrs. NUTBROWN, just yes or no, did you have a conversation
2 with your son on Sunday, August 5th?

3 A. Yes.

4 Q. Would you tell us, please the substance of that
5 conversation?

6 MR. GREENE: Objection.

7 THE COURT: Counsel approach the Bench.

8
9 (AT THE BENCH OUT OF HEARING BY THE JURY)

10 MR. GRAY: Your Honor, first I can outline
11 the matter I expect to be given on the answer. I expect Mrs.
12 NUTBROWN to say that Byron told her that together with Mrs.
13 HARVEY and Mrs. DUNHAM he had the previous day, pursuant to
14 Ernie HARVEY's directions, disposed of certain stolen goods
15 in a river, including a container of dynamite which was
16 thrown into the river by Mrs. DUNHAM, Mrs. HARVEY and Byron
17 NUTBROWN. The theory of the offer is the same as that with
18 respect to Government's Exhibit "5", and the memorandum
19 submitted in connection with that offer.
20

21 THE COURT: What is your objection?

22 MR. GREENE: First, hearsay; second,
23 irrelevance; third, prejudicial.
24

25 THE COURT: Well, I guess I will rule, I
26 will admit it on the same basis as before.

27 MR. GREENE: We are going to object.

NUTBROWN - direct - Gray

1 THE COURT: Going only as to Count 6
2 and not as to..

3 MR. COOK: We would ask for a precaution-
4 ary instruction as soon as it's been given.

5 MR. GRAY: Your Honor, I don't know if
6 Mr. GREENE would request such an instruction, but we would
7 recommend that a cautionary instruction be given just as
8 soon as the evidence comes in so it is fresh in the jury's
9 minds at that point.

11 THE COURT: All right.

12 (ALL COUNSEL AND REPORTER RESUMED THEIR NORMAL SEATS)

13 DIRECT EXAMINATION CONTINUED BY MR. GRAY:

14 Q. Mrs. NUTBROWN, my last question to you was whether you
15 had a conversation with your son on Sunday, August
16 5th; do you recall that question and answer?

18 A. Yes.

19 Q. Will you tell us please, the substance of that conversation?

20 A. My son had gotten a phone call.

21 MR. GREENE: I didn't hear the first
22 statement.

23 THE COURT: She said my son had gotten a
24 phone call.

25 A. They told him that he'd better not go to Court against
26 Ernie HARVEY.
27

NUTBROWN - direct - Gray

THE COURT: No....

MR. GRAY: Your Honor, may I move that that answer be stricken and ask a leading question? I think it would be helpful.

THE COURT: Yes, we are going to strike that answer, ladies and gentlemen, and we will ask that you completely disregard it and we will allow you to ask a leading question, and don't answer this question until I say so, Mrs. NUTBROWN.

Q. Mrs. NUTBROWN, did you have a conversation with your son on August 5th concerning something that he and Mrs. DUNHAM and Mrs. HARVEY had done the preceding day, yes or no?

A. Yes.

Q. Could you tell us, please, the substance of that conversation with your son?

THE COURT: All right, you may answer that. We'll note your objection, Mr. GREENE.

MR. GREENE: Thank you.

A. They had gone - Byron had gone over to the house and Mrs. HARVEY and Mrs. DUNHAM and Byron took some stuff down to the East Montpelier River and threw it in the river.

Q. Did Byron tell you what that stuff was?

NUTBROWN - direct - Gray

1 A. Yes, he did.

2 Q. And will you tell us, please, what he said it was?

3 A. He told me it was a motor boat, a chain saw, a small
4 chain saw, a box of dynamite, some tools.

5 Q. When you say a motor boat, you mean the motor boat
6 itself or just the motor?
7

8 A. Yes, the motor itself.

9 MR. GRAY: Your Honor, that is all the
10 questions I intended to ask with respect to that conversation.

11 THE COURT: Now, ladies and gentlemen, I
12 am going to caution you at this time, as I did previously
13 with regard to the statement that was made to the police
14 officer, that this particular conversation pertains only to
15 Count 6 of the indictment. That is, the count that the defen-
16 dant deprived Byron NUTBROWN of his civil rights. It's not
17 being offered and you are not to understand or to take it on
18 the basis of the truth of the matter which was stated in
19 that statement, but rather you can consider it only as to
20 the extent of the knowledge or awareness that Mr., that might
21 have been in Byron NUTBROWN's mind at that particular time
22 with certain facts which may be relevant to Count 6 of the
23 indictment.
24
25

26 MR. GRAY: May I have one moment, Your
27 Honor? (Talking with Mr. COOK)

WADE - direct - Gray

A. At his home.

Q. Do you recall who was present?

A. His mother.

MR. GREENE: Excuse me, if there's an answer I missed, the question was, where did it take place; I didn't hear the answer.

A. At his home.

Q. And who also was present beside you and Detective WEST?

A. Mrs. NUTBROWN, Byron NUTBROWN.

Q. Now, did the subject matter of your interview with him deal with his being in New Hampshire on August 3rd and 4th?

MR. GREENE: We'll object to his leading this far.

THE COURT: Well, it's leading but we'll take the answer.

A. Yes.

Q. Would you tell us, please, what Mr. NUTBROWN said to you?

MR. GREENE: This is a very broad question, Your Honor, and I don't know if we like having this hearsay evidence.

THE COURT: Well, counsel come to the Bench?

(AT THE BENCH OUT OF HEARING OF THE JURY)

WADE - direct - Gray

1 THE COURT: I think you'd better tell
2 us what you expect this will show.

3 MR. GRAY: First, Your Honor, I did
4 intend to ask a leading question in the area, but they
5 were objected to. Secondly, this is an interview with
6 Byron NUTBROWN which is, contains roughly the same material
7 as the interview by the Newport, New Hampshire Police
8 Department. When I say roughly, I don't have in mind any
9 distinctions myself, but it's another instance where
10 Byron NUTBROWN had given evidence along the lines described
11 which we may submit.
12

13 THE COURT: Is this contained in the
14 substance of this, contained in the 3500 material that was
15 turned over to Mr. GREENE?
16

17 MR. GRAY: I would have to review it,
18 Your Honor, to be sure. I thought what we turned over
19 to Mr. GREENE was a report done by this witness with
20 respect to the entire investigation and this was in a
21 written statement they received, but the content of it is
22 basically the same as that which Mr. NUTBROWN allegedly
23 gave to the Newport, New Hampshire Police Department.
24

25 THE COURT: I take it, Mr. GREENE, that
26 you object to this testimony basically on the same grounds
27 that you have already objected to?

WADE - direct - Gray

MR. GREENE: Basically the same. This isn't even written down; I don't know exactly what the witness will say.

THE COURT: Neither does the Court, but assuming it's within the area touched upon by Mr...

MR. GREENE: ..certainly would renew the same objection.

THE COURT: I will handle it in the same way. I trust that you won't get into some objectionable material. We'll handle it in the same way, note your objection and we'll caution the jury at the end.

MR. GRAY: I have every belief that the material is substantially the same, just how he went over to New Hampshire and matters of that sort.

THE COURT: Let me know when you think you have concluded this portion.

MR. GRAY: I will.

(ALL COUNSEL AND REPORTER RESUMED THEIR NORMAL SEATS)

DIRECT EXAMINATION CONTINUED BY MR. GRAY:

Q. Sgt. WADE, would you please tell us what Byron NUTBROWN said to you with respect to this New Hampshire incident where he had been apprehended?

A. Well, he explained to us how they met on the day previous, how he went to HARVEY's house and that

WADE - direct - Gray

1 they, I believe they went to HARRY's Discount Store;
2 then went to Williamstown and picked up (inaudible)
3 before this incident.

4 Q. And what was the name of the person they picked up,
5 if Mr. NUTBROWN told you?

6 A. Gary DUNHAM. They then went to Newport, New
7 Hampshire where they picked up another individual;
8 then then drove past the lumber company down there;
9 and then went back to the A&W where, I believe, they
10 ate; and then later returned to the lumber company.

11 Q. What was the name - pardon me, did Mr. NUTBROWN tell
12 you the name of the individual that they picked up
13 in Newport, New Hampshire?

14 A. I believe it was Mr. KIBLIN.

15 Q. And did Mr. NUTBROWN tell you anything else?

16 A. He then stated that they dropped him off as a
17 lookout for the police, and that soon after, he
18 was dropped off, he went to a nearby house and
19 phoned his mother who in turn, notified the police.

20 Q. Was there any conversation about the contents of the
21 car as it went to New Hampshire, if you recall?

22 A. I don't recall.

23 Q. Was there any conversation or statements by Mr. NUTBROWN
24 with respect to whether or not the car had stopped
25
26
27

WADE - direct - Gray

anyplace on the way to New Hampshire, other than
HARRY's Discount, as you have indicated?

A. No, sir, it was a through trip, no stops.

Q. And have you given us the substance of your interview
with Mr. NUTBROWN on that occasion?

A. Yes. He went on to say how the police did pick
him up and he was taken to the police station where
he later was met by his mother, and he described
the car somewhat that was being used that evening.

Q. Did he tell you whose car it was?

A. Yes.

MR. GREENE: We'll object to that.

THE COURT: We'll take the answer.

A. He stated it was Mr. HARVEY's vehicle.

Q. Have you given us the substance of that conversation
now?

A. Only he went on to describe the vehicle, how
Mr. HARVEY did have the units capable of receiving
police calls.

MR. GRAY: Your Honor, I have no further
questions about this incident, thank you.

THE COURT: Ladies and gentlemen, I
want to caution you again as far as this testimony concern-
ing what Mr. NUTBROWN may have told the Officer WADE, that

WADE - direct - Gray

1 you are to consider this only in connection with Count 6
2 and it's the count relative to the violation of Byron
3 NUTBROWN's civil rights, and not to consider it in connection
4 with Counts one through five; and we want to caution you
5 that this is being allowed, the officer's testimony is
6 being admitted, but not to establish the truth of anything
7 which Mr. NUTBROWN may have told the officer. It's solely
8 on the issue of such knowledge and awareness which Byron
9 NUTBROWN may have had concerning relevant events involving
10 Mr. HARVEY as applied to Count 6.
11

12 MR. GRAY: Thank you, Your Honor.

13 DIRECT CONTINUED BY MR. GRAY:

14 Q. On the following day, Sgt. WADE, did you and other law
15 enforcement officers proceed to the vicinity of
16 Newport, New Hampshire?
17

18 A. Yes, we did.

19 Q. And who went with you?

20 A. Officer Ronald WEST, Detective WEST, from the Barre
21 City Police Department, and Patrolman JACOBS of the
22 Barre Town Police Department.
23

24 Q. And would you tell us, please, where you went first in
25 New Hampshire?

26 A. We went to the Newport Police Department.

27 Q. And approximately how long did you remain there?

WADE - cross - Greene

Q. And on that occasion, for the same reason, you went to interview Mr. DUNHAM?

A. For the reason that they had discussed with me?

Q. Yes.

A. This law enforcement problem?

Q. Yes.

A. That was part of it, yes, not all of it.

Q. As a matter of fact, Mr. DUNHAM was interviewed by you, was he not, because you also were searching for information useful to you in Vermont?

A. Yes.

Q. And you specifically asked Mr. DUNHAM if he had traveled to Newport with Mr. HARVEY?

A. Yes.

Q. Didn't you. And isn't it a fact that he told you...

MR. GRAY: Objection, Your Honor.

THE COURT: Well, come to the Bench.

(AT THE BENCH OUT OF HEARING OF THE JURY)

THE COURT: What's your objection?

MR. GRAY: Hearsay, Your Honor. I don't know that it has any relevance to any issue in this case.

THE COURT: What do you claim for it?

MR. GREENE: Well, we have had testimony,

WADE - cross - Greene

1 Your Honor, from Special Policeman PATTEN, that he saw
2 Ernest HARVEY in his town in New Hampshire. We have also
3 had testimony regarding statements which were made by,
4 allegedly made by Byron NUTBROWN III. Now, here we have
5 also a statement made which is like the NUTBROWN statements
6 except that this one contradicts those statements.
7

8 THE COURT: Let me see what you're
9 referring to.

10 MR. GREENE: We can make him our own
11 witness; might save the Court's time.

12 MR. GRAY: Your Honor, that's not
13 the problem.

14 THE COURT: No, go ahead.

15 MR. GRAY: The problem is that it's
16 hearsay and we obviously would like very much to cross
17 examine Mr. DUNHAM on that statement if it's going to be
18 introduced; unlike this, the statement of Mr. NUTBROWN
19 which is relevant on Count 6, the statement of Mr. DUNHAM is
20 irrelevant on each and every count and we are not claiming
21 that NUTBROWN's testimony is relevant on Counts one through
22 five, which is the only, which are the only counts which
23 this being developed...

24 THE COURT: Wouldn't this be relevant
25 to Count one?

WADE - cross - Greene

MR. GRAY: I meant one through five.

THE COURT: Wouldn't it be relevant to Count one? The problem of the Court says that Mr. DUNHAM is alive and well and theoretically able to testify, probably would not have testified because of the possibility having possibility of state criminal prosecution.

MR. GRAY: Your Honor, he would be, yeah, if he's available then Defendant also can call him. Now, I'll admit that there's a distinction, and that is probably indicated to this Court and to counsel, that we have sought and obtained an oral indication that we have permission to apply to the Court for immunity order. We do not have it in this point in writing, although we've got to have it. However, as I also indicated, both to counsel and the Court, it's not at all clear to us Mr. DUNHAM will be called for any number of reasons including the fact that Mr. FRANK, Mr. DUNHAM's attorney, has indicated Mr. DUNHAM will refuse to testify irrespective of the grant of immunity, and that frankly, that's not a problem we want to get into in this trial.

THE COURT: Even so, I think that..

MR. GRAY: Your Honor, I wanted to argue if Mr. GREENE wants to put in, through this witness, statements of Mr. DUNHAM on the theory that they contradict

WADE - cross - Greene

1 what has been said, that he's opening up the door to all
2 statements Mr. DUNHAM has made and I can tell you there
3 are some of them we'd like very much to put in.

4 MR. GREENE: Just for the record,
5 Defendant disagrees with that proposal.

6 THE COURT: What proposal?

7 MR. GREENE: One, that if this state-
8 ment were admitted that it would open the door to all the
9 statements made by DUNHAM.

10 MR. GRAY: Your Honor, the Court knows
11 from this person's testifying it was this witness together
12 with ASTIN who interviewed Mr. DUNHAM. It was to this
13 witness that Mr. DUNHAM indicated where the body could be
14 found. The contents of the statement, I believe the Court
15 is aware of that, they certainly would tend to well, with-
16 drawn - not withdrawn - I think I've made my point.

17 Your Honor, one other question, I think
18 I have just understood the question you asked, whether the
19 statement of DUNHAM wouldn't be admissible on the conspiracy
20 counts. I think that the law is quite clear, that a vicarious
21 admission or statement is admissible only if made before
22 the conclusion of the conspiracy. There is at least a
23 legal question in this case whether we have one conspiracy
24 or two although two are charged because they have different

WADE - cross - Greene

objectives. In other words, if it's continuing conspiracy to one burglary, Lavalley's, and later to kill Byron NUTBROWN and this is in furtherance of the conspiracy; however, I think that it's also arguable that the conspiracy in count one ended at the time of the arrest of all the persons and there is case law to that effect.

THE COURT: Well, I think that since well, I think that since Mr. DUNHAM is capable of being a witness, even though he may not in fact, testify to anything, because of this may plead the Fifth Amendment, because of the very good possibility that he's going to be charged in this area, state offence, would make this particular statement at this time inadmissible. However, if DUNHAM, in fact, is called, and does refuse to testify, I'm not sure, but at that point, it might be, become admissible. For the time being and at the present state of the evidence, I'm not going to let you get into this but I will be perfectly frank. I don't know about this ruling.

MR. GRAY: Your Honor, I'm not sure WADE will be available if there's any change in Your Honor's...
(ALL COUNSEL AND REPORTER RESUMED THEIR NORMAL SEATS)

MR. GREENE: We have no further questions, Your Honor, at this time.

JACOBS - direct - Gray

Q. Now, in the course of your....

MR. GREENE: Excuse me, was that objection sustained?

THE COURT: No, I said we'd take the answer although I agreed it was a rather general question.

Q. Officer JACOBS, in the course of your work in the Barre Town on the Barre Town Police Department, have you received reports from people in businesses within the area that from time to time dynamite has been stolen from them?

A. Yes, sir.

MR. GREENE: We'll object to the question and the answer.

THE COURT: Let's have counsel and reporter come to the Bench.

(AT THE BENCH OUT OF HEARING OF THE JURY)

THE COURT: I think that you should make an offer as to what you expect this witness' testimony to show.

MR. GRAY: Very well, Your Honor, in this particular area of inquiry, I expect the witness to testify he has received a report of thefts and quite a number of them, and in the course of his work, he has referred those reports of theft to either the FBI or the Alcohol,

JACOBS - direct - Gray

1 Tobacco and Firearms portion of the Treasury Dept. We do
2 not make any claim and this witness will not testify that
3 any of those thefts had anything to do with Mr. HARVEY.

4 THE COURT: How is this relevant?

5 MR. GRAY: The purpose, Your Honor, is
6 to show relevant to, relative to Count 6, that this is an
7 area of federal interest where material and information
8 which comes to the attention of the police departments
9 involves turning the information over to federal agencies.
10 I might say that I have another purpose for this witness
11 which is somewhat related. This witness also had a
12 conversation with Gary DUNHAM at the Sullivan County Home
13 in Unity, New Hampshire. This is on the occasion which
14 Agent WEST has already testified, that they went over there
15 and what I intend to prove through this witness and, or
16 through the next witness, Ronald WEST, is from the Barre
17 City Police Department, is that DUNHAM was told by, I
18 believe both these persons, that cases involving dynamite
19 were turned over to the federal agencies.
20
21

22 Now, I might point out that I'm sure
23 that the Court and counsel raise a question as to the
24 admissibility of a conversation with DUNHAM. I do have
25 a case that holds that under very similar circumstances,
26 a statement made to someone like DUNHAM is circumstantial
27

JACOBS - direct - Gray

evidence of the fact that it or the jury can conclude from the fact that it was passed on to Mr. HARVEY. And I have cites, 1970, I think three First Circuit cases on that point. I had hoped that this issue would not go until tomorrow and I would have done a memorandum in writing on it tonight. We're at the end of the day so we proceeded anyway.

MR. GREENE: I might say, Your Honor, if another Court - I know the Court does not like to step any time. If these matters are more, ought to be decided on the Bench conference at this time, I don't think we'd have any objection to putting it off until tomorrow so we can litigate it more fully, if the Court wishes.

THE COURT: Yes, I think if he's going to testify about the conversations that he, you say he had or he was there when WEST said something.

MR. GRAY: Your Honor, I can, I believe I can prove the substance of the conversation through WEST also who will be here tomorrow. That's why I thought that if Your Honor did, you know, if you're satisfied, the first part of power, our purpose of putting him on, I would have probably simply try to prove it with WEST tomorrow, but we came here I guess on objection on the original grounds.

THE COURT: I appreciate the original

JACOBS - direct - Gray

grounds but I'm not satisfied as to the relevancy of that,
as far as this particular defendant is concerned.

MR. GRAY: You're talking about the
report of theft to him, Your Honor?

THE COURT: I'm talking about his
testimony and anticipated testimony that there are thefts
that he reports to federal authorities, what relevancy that
has to this?

MR. GRAY: Well, Your Honor, it's our
contention that we, in some way or another, have to prove
some federal purpose or intent with respect to the killing
of Byron NUTBROWN, or at least a federal affect, and what
we're seeking to establish by circumstantial evidence and
direct evidence is that it was just a matter of time before
the dynamite aspect of the Lavalley burglary would have
been reported to federal agencies.

THE COURT: Well, I think that probably
that may be so, but I don't think what the practice in
Barre Town was is particularly relevant. It's going to
make it more specific as far as, well, I don't know what.

MR. GRAY: Well, I do have some instances,
Your Honor, of theft in which he can testify that in fact
the given theft was reported by him to given federal agency.

THE COURT: Well, I have some serious

JACOBS - direct - Gray

doubts as to the admissibility of this evidence, but it's the end of the day, even the first and second, and since it's the end of the day we can take our evening recess and you can spot me the law on both points and pro and con and we'll make a ruling in the morning.

MR. GRAY: I appreciate Your Honor's giving me that opportunity, giving us that opportunity.

THE COURT: Also gives the defense an opportunity to consider the matter too.

MR. GRAY: As Your Honor's going off the Bench - before the jury, or take a moment, I'd like to make a statement if I may.

Your Honor, we'll have available more material 3500 material and other material for Mr. GREENE and because it appears we didn't allow him enough time this morning or there's still delays, we'll have some available then, I'd say seven o'clock tonight, if Mr. GREENE will call us before he comes over, we'll make sure it's available before he comes.

THE COURT: After we take our recess why don't counsel drop into my chambers?

(ALL COUNSEL AND REPORTER RESUMED THEIR NORMAL SEATS)

THE COURT: Ladies and gentlemen, I think in view of this latest problem, arisen, we'll take

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JACOBS - direct - Gray

our evening recess at this time, and we'll resume in the morning at 9:30, and there is some possibility that tomorrow we may work in the morning session through until one o'clock and take our noon recess between one and 2:30. The reason I tell you this now is so you can eat an especially big breakfast if you want, or bring a small candy bar or something to eat in the morning recess to see you through. I'm not positive this will happen, but you can be forewarned.

I'll ask you to follow the Court's instructions not to discuss the case with anybody, read or listen to or hear anything about it; see you in the morning at 9:30.

(THIS TRIAL ADJOURNED AT 4:26 P.M., 22 OCTOBER 1974 and RECONVENED AT 9:30 A.M., 23 OCTOBER 1974)

THIRD DAY

MORNING SESSION

(IN CHAMBERS)

9:30 A.M.

THE COURT: The Government filed a memo to those two points we discussed last night. Mr. GREENE, I understand you don't intend to file one.

MR. GREENE: No, Your Honor, we don't intend to file one.

THE COURT: Have you read the cases

In Chambers

cited by the Government?

MR. GREENE: I went to the library last night and I read through the SULLIVAN case and the case, yes, to which reference also is made in the memorandum. I haven't seen the GOTLEY (phonetic) case, however.

THE COURT: Why do you claim USTIES (phonetic) has any bearing?

MR. GRAY: Your Honor, because I think it could be argued to stand for the proposition that, that matters not directly connected with the defendant can be considered by the jury as circumstantial evidence of the fact sought to be proved. In that case, it was not circumstantial evidence of the defendant's knowledge which was in question, but it was circumstantial evidence of the possibility that the defendant had used a car in a getaway and in either the car, when the car had not been tied to him directly.

THE COURT: SULLIVAN, I don't think quite stands for the proposition that you advance in your brief.

MR. GRAY: Your Honor, we have done a considerable amount of thinking on this matter over the night, and are prepared to make a more limited offer of proof, subject to the possibility that we would renew a

In Chambers

larger offer of proof after some intervening witnesses.

Let me make that clear; we would prepare on the second point to limit our questions to JACOBS to the following: Did you and WEST go over to the Sullivan County Jail and speak with DUNHAM? Answer: Yes. And did you tell him something at that time? Answer: Yes. And that would be all. The reason we would like to prove that is we now believe we can connect what was said to DUNHAM to the defendant HARVEY through another witness, but we do think that we should be permitted to do that much at least because it will tend to show something was in fact said.

THE COURT: We will permit that much evidence.

MR. GRAY: I would like to say, Your Honor...(interrupted)

MR. GREENE: We would object to even that much.

THE COURT: I understand.

MR. GRAY: Your Honor, we may renew our offer on the more difficult question and afterwards recall JACOBS. To use the conversation was depending on the intervening evidence. I think we can avoid it now.

THE COURT: I think the Court will be in a better position to rule after we have additional evidence.

In Chambers

MR. GRAY: We appreciate that.

THE COURT: Now, as to the first point, we will allow that.

MR. GREENE: Which point is that?

THE COURT: The practice of the Barre Town Police Department as to refer stolen dynamite complaints or at least inform federal authorities of this fact.

MR. GREENE: Your Honor, I would very strongly disagree with the position. I just want to state for the record my reasons. What the Barre Police Dept. does now or what their general practice was then, does not establish in any way the type of motive of intent which the Government must establish and might be difficult if the members or a member of that department who knew of the practice were on trial. But in this particular case, it doesn't connect up with the Defendant HARVEY at all. While on the one hand it, I feel it ought to be clear to the jury as well; on the other hand, there seems to be absolutely no probative value to that type of testimony, and therefore, we would suggest that the only value remaining for it would be to give the jury room for speculation and leave them to believe they may speculate on such things.

THE COURT: Well, no, I disagree, I think that there is a federal dynamite act or whatever you want to

In Chambers

call it, Explosive Act I guess. And I think it's germane to show the thefts or patterns involving explosives of this nature as a matter of routine, or referred to the federal authorities. I don't think that it does, in any way, connect your client to this fact at any particular time, but I think it's in the nature of evidence or cumulative evidence that, which I expected the Government is going to later introduce. Well, I'll allow it.

MR. GRAY: Do you have something?

MR. GREENE: No, I think you've covered it.

MR. GRAY: Your Honor, I'd like to take this opportunity to bring up a matter which has come to our attention this morning. By way of background, as I said, last night we furnished Mr. GREENE with a packet of material which I think properly can be called 3500 material, grand jury testimony primarily, and another packet of material which we are furnishing as a result of language in the PACELLI (phonetic) case and under BRADY with Maryland because we believe it may provide some leads or cross examination material for Mr. GREENE.

This morning we received for the first time a copy of a letter dated October 21, 1974, from Eleanor KRASNOW, attorney for Mr. KIBLIN in New Hampshire

JACOBS - direct - Gray

HE WAS STILL UNDER OATH)

DIRECT EXAMINATION CONTINUED BY MR. GRAY:

Q. Officer JACOBS, I believe that in your testimony yesterday, we got as far as your employment with the Barre Town Police, and I believe I'd asked you whether your department has, from time to time, received reports of stolen dynamite, which occurred within your jurisdiction in the Barre Town area?

A. That's correct.

Q. And do you, has your department received such reports?

A. Yes, sir.

Q. And does your department have a policy or procedure with respect to how those reports are handled?

A. Yes, sir.

Q. And would you tell us, please, what you do if, what if anything you do with such reports of theft other than investigate them by your own department; will you tell us, please?

A. Yes. Normally, after the reports are logged, we have to notify the federal authorities, and it's responsibly both of us and the owners of these dynamites. It's normally a policy with our department that we notify the federal authorities and it's also a responsibility of the owner of these

WEST - direct - Gray

1 A. September 8th, that he had taken Byron to Post
2 Mills and, with the intention of giving him an
3 airplane ride. He stated that Lori AJA was supposedly
4 supposed to go with them, but they rode by the AJA
5 residence and Byron saw somebody there that he
6 didn't want them to know that he had been to the
7 AJA residence for fear that they would go back and
8 tell his mother, and so they didn't stop, but they
9 just continued to Post Mills, and there was no
10 airplanes available for rent, and so they returned
11 to Barre, let him off at the Post Office.

12 Q. Have you given us the substance of that interview?

13 A. Yes.

14 Q. Detective WEST, I want to take you back again to the
15 occasion in early August 1973; did you receive
16 word from someone that Byron NUTBROWN had been
17 picked up in New Hampshire or something to that
18 effect?
19 effect?

20 A. Yes, Chief LACROIX of the Newport, New Hampshire
21 Police Department visited me at Barre and he
22 advised that they had had an attempted burglary
23 in Newport and Byron had been apprehended.

24 Q. Now, as a result of that information, did you interview
25 anybody?
26

WEST - direct - Gray

A. Yes, I interviewed Byron.

Q. And was that in the presence and in the company of
Sgt. WADE of the Vermont State Police?

A. Yes.

Q. Do you recall the date of that interview?

A. That was August 6th at 5:00 p.m.

Q. Would you tell us please, in substance, what Mr. NUTBROWN
said to you on that occasion?

MR. GREENE: Objection.

THE COURT: Overruled.

A. Byron stated that on the third of August that he
had been with Gary DUNHAM, Ernie HARVEY and
George KIBLIN. He stated that he had left Barre
with Mr. HARVEY at approximately 8:40 p.m.; they
had gone to Williamstown and picked up Gary DUNHAM;
then they traveled from Williamstown to Newport,
New Hampshire where they picked up George KIBLIN.
He stated that during the trip to Newport that
Mr. HARVEY had made the statement that he had blown
the door off the safe in the past and also that he
was going to break and enter a wholesale meat place
in East Montpelier, by the name of Delair's.

I asked Mr. NUTBROWN if he had observed
any dynamite and the answer was that there could

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WEST - direct - Gray

1 have been some but everything was in a burlap bag in
2 the trunk. He didn't actually see the dynamite.
3 Then when they got to Newport, they drove by or
4 after picking up Mr. KIBLIN, they drove by the
5 lumber yard and went to an A&W; they then returned
6 to the lumber yard where Byron was left as a lookout
7 and Gary DUNHAM left with the car and Mr. HARVEY
8 and Mr. KIBLIN attempted to break into the lumber
9 company, at which time the police arrived, and he
10 ran away and went to some home in the area there.

11 He also stated that while Mr. KIBLIN
12 was in the vehicle that he made the statement that
13 he had been in the lumber yard, in the lumber
14 company and had seen the safe and stated there
15 should be at least ten thousand dollars in the safe.

16
17 that
18 Q. This is what Mr. NUTBROWN said / Mr. KIBLIN had said X
19 in the car?

20 A. Right.

21 Q. Is this in the car at the gravel pit or..

22 A. He didn't say exactly when it was. He said it, but
23 it was before the attempted burglary.

24 Q. And so I'm clear, the date of this statement by Byron
25 NUTBROWN was August 6, 1973?

26 A. That's right.

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WEST - direct - Gray

1 MR. GRAY: Your Honor, I have no further
2 questions on this subject.

3 THE COURT: Ladies and gentlemen, once
4 again I want to caution you that you are to receive that
5 statement or that statement is being received, not for the
6 truth of the matters which it contains. It has no applica-
7 tion to guilt or innocence of Mr. HARVEY as far as Counts
one through five are concerned, that you are to consider it
solely in connection with Count six, and only for the purpose
11 of state of mind or such knowledge or awareness as Byron
12 NUTBROWN might have had and as to relevant events concern-
13 ing Count 6.

14 MR. GREENE: Again, Your Honor, my
15 apologies to counsel and the jury and the Court. In
16 trying to get everything down, I missed the last couple of
17 questions again. My apologies.

18 THE REPORTER: (Read back last three
19 questions and answers)

20
21 DIRECT CONTINUED BY MR. GRAY:

22 Q. Detective WEST, did you have occasion on June 26th of 1974
23 to participate in some official duties in the
24 vicinity of an abandoned house on the Williamstown-
25 Chelsea Road?
26

27 A. Yes, I did.

KIBLIN - direct - Gray

1 Q. And where had you stored it?

2 A. Had it in my shirt. They didn't know exactly what
3 it was.

4 Q. And were you handcuffed at some point?

5 A. Yes, they handcuffed me to a telephone pole out in
6 the yard there about an hour while they looked for..
7

8 Q. Was that painful?

9 A. A little bit.

10 Q. The bag of explosives you have just described, was that
11 the same bag of explosives that you received from
12 Mr. HARVEY?

13 A. Yes.

14 Q. Incidentally, Mr. KIBLIN, did you ever have a conversa-
15 tion with Mr. HARVEY about where that, those explo-
16 sives had come from?
17

18 A. I believe we did, but there was sometime later
19 after I had gotten out on bail and they were out
20 on their own.

21 Q. Do you recall where that conversation took place?

22 A. It was someplace in Vermont.

23 Q. Was that conversation with Mr. HARVEY?

24 A. Yes.

25 Q. What did Mr. HARVEY say to you about that bag of
26 explosives?
27

KIBLIN - direct - Gray

- 1 A. I believe he told me that they broke into a granite
- 2 shed and got them and, I'm not positive, but I think
- 3 that he also told me that Byron NUTBROWN was with
- 4 him when he got the explosives.
- 5 Q. Do you recall where that granite shed was, whether he
- 6 told you where that granite shed was?
- 7 A. He may have told me, but I don't remember that.
- 8 Q. Where were you taken after you were arrested at Lavalley's,
- 9 Mr. KIBLIN?
- 10 A. Newport Police Station.
- 11 Q. How long were you there?
- 12 A. Until about 10:00 o'clock the next morning, went
- 13 for arraignment.
- 14 Q. Did there come a time when you were transferred someplace
- 15 else?
- 16 A. Yes, I was transferred to Sullivan County Jail to
- 17 await a Probable Cause Hearing.
- 18 Q. Did there come a time - was Mr. DUNHAM[†] ever transferred
- 19 to Sullivan County Jail with you?
- 20 A. Yes.
- 21 Q. When did you and Mr. DUNHAM arrive at the Sullivan County
- 22 Jail?
- 23 A. Sometime Saturday.
- 24 Q. Are you talking about August 4th?
- 25
- 26
- 27

1. MR. GRAY: Nothing further, Your Honor.

2. THE COURT: All right, Mrs. DUNHAM.

3. (WITNESS EXCUSED AND WITHDREW)

4. MR. GRAY: At this time, the Government
5. rests its direct case.

6. THE COURT: The Government rests.

7. Ladies and gentlemen, this is a good
8. time to take our evening recess and we will do so. We will
9. resume in the morning at 9:30. Please don't discuss the
10. case or read anything about it or listen or see anything
11. about it. We'll see you in the morning at 9:30.

12. (THIS TRIAL ADJOURNED AT 4:20 P.M., 24 OCTOBER 1974 AND
13. RECONVENED AT 9:10 A.M., 25 OCTOBER 1974)

14. 4:25 P.M.

15. (In Chambers - No Jury) October 24, 1974

16. THE COURT: At the conclusion of the
17. Government's case, does the plaintiff have any motions?

18. MR. GREENE: The plaintiff?

19. THE COURT: I mean the defendant, excuse
20. me. It's been a long day.

21. MR. GREENE: Yes, we would have a few.

22. THE COURT: Well, let's shoot.

23. MR. GREENE: The defendant moves to quit
24. on, off the record.

In Chambers

1 I'll take each count separately. So
2 starting again, the defendant moves to dismiss the charges
3 contained in Count 1 of the indictment, the charge of
4 conspiracy to commit an offence against the United States,
5 on the grounds that the evidence presented by the Government
6 does not establish a prima facie case of that offence and
7 would not warrant a conviction of that offense. Without
8 limiting in any way the generality of the motion, the
9 defendant offers further grounds for the motion to quit
10 that the Government has failed to introduce evidence which
11 would establish agreement between the defendant and any
12 other person, as charged. Being further particular, the
13 Government has failed to introduce evidence which would
14 tend to show that the defendant agreed to transport stolen
15 property in an amount or valued at more than five thousand
16 dollars; that the Government failed to introduce evidence
17 which would tend to show that the defendant agreed to either
18 transport or receive stolen dynamite knowing that it had
19 been stolen; that the Government has failed to introduce
20 evidence which would tend to show that the defendant agreed
21 to transport dynamite from one state to another for
22 destructive purposes. And to emphasize a particular aspect
23 of the case, the Government has failed to introduce evidence
24 to show that the defendant agreed to transport dynamite from

In Chambers

1 one state to another in any way under any conditions for
2 any purposes.

3 Also, the Government has failed to
4 introduce in evidence which would tend to show that the
5 defendant agreed to carry an explosive substance during
6 commission of the conspiracy. And as to the overt acts
7 alleged by the Government, the Government has failed to
8 introduce evidence to show that the defendant traveled from
9 Barre, Vermont to Newport, New Hampshire on August 3, 1973.
10

11 And the Government has failed to introduce
12 evidence to show that the defendant had conversations with
13 one or more co-conspirators at any time during the month
14 of June, month of July and month of August in the year 1973.
15

16 THE COURT: Are you finished with that
17 one?

18 MR. GREENE: I'm finished with that
19 Court.

20 THE COURT: Does the Government wish
21 to respond?

22 MR. GRAY: Very briefly. There are three
23 object charges as objects of this conspiracy. I believe
24 the law is that proof of any one object will do, although
25 I believe at any point there is proof where, from which the
26 jury could reasonably find that all three objects of the
27

In Chambers

1 conspiracy were met.

2 With respect to the first object, the
3 interstate transportation of stolen property valued in
4 excess of five thousand dollars, proof was that KIBLIN
5 said that he had told the co-conspirators he thought there
6 would be at least ten thousand dollars in there, and although
7 in response to Mr. GREENE's questioning, he, I think
8 indicated, there was no specific agreement as to how it
9 would be split, that I think his words were to the effect
10 that that was the way we always did it, or words to that
11 effect, and of course, the proof shows that both DUNHAM and
12 HARVEY, and for that matter, NUTBROWN, if he were to be
13 cut in, are from the Barre, Vermont area. I do not think
14 it unreasonable for the jury to infer it was part of the
15 agreement that the Vermonters' shares would be returned to
16 Vermont. Therefore, whether or not this was discussed, this
17 is irrevelant; there was an agreement to violate Section 2314.
18 With respect to the, I think, Your Honor, that Mr. KIBLIN
19 indicated that this was his understanding at least that
20 amount of money, six thousand dollars, Vermonters' share,
21 would be going back to Vermont.

22 With respect to the second object, the
23 interstate transportation, knowing it was stolen, I won't
24 dwell on the transportation aspect. I think it's fair the

In Chambers

1 jury could find that HARVEY and others did agree to transport
2 it. The proof that it was stolen, knowing it was stolen,
3 comes from the conversation Mr. KIBLIN reported and which
4 HARVEY told him it was stolen; it was not a conversation at
5 the gravel pit, but it was later one, and certainly for the
6 third purpose, destructive purposes, I think it's quite
7 clear that the jury could find that the purpose of transport-
8 ing the dynamite was to blow the safe at Lavalley's, focusing
9 briefly on the overt acts.

11 Again, I think it's quite clear that the
12 Government need only prove one of the overt acts charged
13 in the indictment. From the phone calls that he received
14 and from the other facts in the case, I think that the jury
15 can properly find that DUNHAM and HARVEY for that matter,
16 traveled from the vicinity of Barre, Vermont to Newport,
17 New Hampshire, and secondly, Mr. KIBLIN testified to many
18 conversations that the co-conspirators had with each
19 other, both in Vermont and elsewhere with respect to this
20 transaction.

22 THE COURT: All right, the defendant's
23 motion for acquittal as to Count 1, is denied. And we're
24 going to suspend at this time, and I'll ask counsel and
25 reporter to return at 9:00 in the morning and I'll listen
26 to the balance of your motions at that time.

In Chambers

(THIS IN-CHAMBERS DISCUSSION WAS ENDED AT 4:40 P.M. ON
OCTOBER 24, 1974, AND WAS FURTHER CONTINUED IN CHAMBERS
AT 9:10 A.M. ON OCTOBER 25, 1974.)

FIFTH DAY

MORNING SESSION

(In Chambers - no jury) 9:10 A.M.

THE COURT: Why don't you continue
from last night, Mr. GREENE?

MR. GREENE: Defendant moves for acquittal
as to Count 2 of the indictment on the grounds that the
Government has failed to introduce evidence which would
warrant or which proves a finding of guilty without limiting
the generality of the above. But for emphasis, defendant
says that the Government has failed to introduce evidence
showing that defendant transported dynamite from the district
of Vermont and from the State of Vermont to Newport, New
Hampshire; further, that the Government has failed to prove
that defendant had the requisite knowledge of having
transported dynamite from the District and State of Vermont
to any place in the State of New Hampshire.

THE COURT: Is that it?

MR. GREENE: On that one, yes.

MR. GRAY: Your Honor, the Government
feels there is ample evidence from which the jury could find

In Chambers

1 each and every element.

2 THE COURT: Motion denied.

3 MR. GREENE: The defendant moves that
4 Count 3 - strike that. The defendant moves for acquittal
5 on Count 3 on the grounds that the Government has failed to
6 introduce sufficient evidence to prove or warrant a finding
7 of guilty of the offence charged in this Count. In no
8 way limiting the generality of the above, but for emphasis,
9 defendant says that the Government has failed to introduce
10 evidence which tends to show or prove or warrant a finding
11 of guilty of the offense charged therein.
12

13 (OFF THE RECORD DISCUSSION)

14 MR. GREENE: In particular, and I hope
15 I'm not repeating myself, without limiting the generality
16 of the above, the defendant says that the Government has
17 failed to introduce evidence showing that he either shipped
18 or transported or received dynamite from the State and
19 District of Vermont to the State of New Hampshire. Further,
20 that the Government has failed to introduce evidence which
21 would prove or tend to show that defendant had knowledge of
22 shipping or transporting dynamite from Vermont to New
23 Hampshire or receiving it in New Hampshire.
24

25 MR. GRAY: Your Honor, we submit that
26 there is ample evidence from which the jury can find each and
27

every element of that also.

THE COURT: Motion denied.

MR. GREENE: Count 4, the defendant moves for acquittal on Count 4, which alleges the transportation of stolen dynamite, knowing it to have been stolen, because there is no evidence in the Government's case to show that the dynamite was stolen. There is no evidence to show that the defendant knew or had reasonable cause to know that the dynamite was stolen. But the above statements are made without limiting the generality of the motion to acquit. And further, without limiting the generality of the motions to acquit on Count 4, the defendant says the Government has failed to show that the defendant has transported from the State of Vermont to the State of New Hampshire, transported within the State of New Hampshire, received, concealed or disposed of dynamite. However, I would emphasize above all else, in regard to Count 4, the absence of evidence to show that the dynamite was stolen and the absence of knowledge that it was stolen. I'm putting these items together when I speak, but I ask that the Court consider them separately, because there is not even a suggestion of evidence that the dynamite was actually stolen.

MR. GRAY: Your Honor, George KIBLIN testified that Ernest HARVEY told him sometime after the

1 burglary attempt that the dynamite had in fact been stolen.
2 That would establish both the fact of the theft and Mr.
3 HARVEY's knowledge of the transportation aspect of it.
4 Of course, we have already talked about, and we would submit
5 that the jury can reasonably find each and every element
6 of this offense based upon the evidence introduced at
7 trial.
8

9 THE COURT: We'll deny the motion as to
10 Count 4. Now, there was some indication last night that
11 perhaps the Government was not going to pursue Count 4.
12 Have you made a determination in that regard?

13 MR. GRAY: Your Honor, we have not
14 changed our mind in that regard although, I'll be frank
15 to say we are reluctant to make a formal motion until we hear
16 the defendant's case and see what they have. We don't know
17 what the defense in this case will be. On the chance that
18 there may be some defense, we don't know about, what we
19 believe are the clear facts, we would, at this time, ask
20 the Court to rule on Count 5.
21

22 THE COURT: Do you want to make a motion
23 to Count 5?
24

25 MR. GREENE: Sure. On Count 5, the
26 defendant moves to acquit the offense charging carrying an
27 explosive to wit, dynamite, during the commission of

In Chambers

1 conspiracy against the United States. Firstly, the Govern-
2 ment has failed to establish evidence which tends to show
3 conspiracy against the United States as charged in the
4 first count, which was incorporated by reference, I believe
5 in this count; and secondly, no one has shown and no evidence
6 demonstrates that the defendant carried dynamite. While
7 the defendant, while disputing the veracity and accuracy of
8 George KIBLIN's testimony, has heard his testimony that he
9 carried dynamite during the commission of the offense.
10

11 THE COURT: What about aiding and
12 abetting?

13 MR. GREENE: Beg your pardon?

14 THE COURT: What about aiding and
15 abetting?
16

17 MR. GREENE: The defendant says that the
18 Government has failed to introduce evidence of aiding and
19 abetting as well....

20 MR. GRAY: Your Honor, I won't address
21 myself again to - I'm sorry.

22 MR. GREENE: Make sure I've got it at
23 all.

24 MR. GRAY: I'm sorry.

25 MR. GREENE: The defendant wishes to
26 incorporate by reference in this motion for acquittal on

In Chambers

1 Count 5 all that has been stated regarding the other
2 motions, inasmuch as many of the elements are common.

3 Also, defendant wishes to incorporate
4 by reference in each motion all of the statements made in
5 regard to every other motion, of course.

6 MR. GRAY: Your Honor, we believe that
7 the jury could find each and every element of this offense.
8 We have already talked about the elements of Count 1. I
9 won't repeat them this morning.

11 THE COURT: Well, on this motion, the
12 Court is going to reserve its decision. Count 6?

13 MR. GREENE: On Count 6, defendant moves
14 to acquit the offense charging conspiracy to violate the
15 civil rights of Byron NUTBROWN III resulting in his death.
16 Defendant says the Government has failed to introduce evidence
17 showing that the defendant injured, oppressed, threatened
18 or intimidated Byron NUTBROWN III. Further, the Government
19 has failed to introduce evidence to show any agreement
20 between defendant and another person to injury, oppress,
21 threaten or intimidate Byron NUTBROWN III.

22 The Government has failed to introduce
23 sufficient evidence that Byron NUTBROWN III was a citizen of
24 the United States of America. The Government has failed
25 to introduce evidence of specific intent on the part of the
26
27

In Chambers

1 defendant to violate or to conspire to violate a right or
2 privilege secured to Byron NUTBROWN III by the constitution
3 or laws of the United States.

4 THE COURT: Is that it?

5 MR. GREENE: I think that's it.

6 MR. GRAY: Your Honor, I think only
7 two points need commenting on. One is that the Government
8 did offer proof that Byron NUTBROWN III was a citizen of
9 the United States through his mother who was born in Barre.
10

11 THE COURT: Yes, the evidence is
12 uncontroverted so far.

13 MR. GRAY: Your Honor, we respect to the
14 specific intent on the, and the purpose of interference with
15 a constitutional right, if the testimony of Mr. KIBLIN is
16 believed, it seems clear that at least a purpose of their
17 conspiracy was to keep him from telling what he knew about
18 federal offenses, and therefore, under the Anderson case and
19 others, we would submit that the jury could find each and
20 every element of Count 6.
21

22 THE COURT: We deny this motion also.
23 I'll be ready to start promptly at 9:30.

24 MR. GREENE: Yes, there may be another
25 motion or two I ought to make regarding all of the offenses.
26 The defendant moves to acquit on the grounds that the
27

HOULE - direct - Greene

1 occasions?

2 A. I'd say several occasions.

3 Q. And did Byron ever discuss with you any of his own
4 personal thoughts?

5 A. Yes.

6 Q. Did there come a time when you and Byron discussed his
7 family life?

8 A. Yes.

9 Q. And did he have any particular complaints?

10 MR. GRAY: Objection, Your Honor.

11 THE COURT: Yes, come to the Bench,
12 please.

13 (AT THE BENCH OUT OF HEARING OF THE JURY)

14 MR. GRAY: Your Honor, the objection
15 is based on the belief that this testimony is being offered
16 for the truth of what this witness is testifying to but
17 what Byron NUTBROWN said and as such, I can't see any basis
18 for admissibility.

19 THE COURT: Let's get the offer from
20 the counsel for the defendant.

21 MR. GREENE: We expect the witness to
22 state that Byron NUTBROWN III is sick and tired of being
23 required to stay home all the time, that he was tired of
24 babysitting and that he was planning to run away, and that

HOULE - direct - Greene

1 this was all within the short period of time before his
2 alleged disappearance. Also, bearing on the other statement,
3 alleged statements of Byron NUTBROWN introduced, we expect
4 the witness to testify that Byron NUTBROWN III told her that
5 he would try to get into big trouble so that he could get
6 into Weeks School and get out of the house, get away from
7 home. That's all I have to say. And there's one other
8 thing I have to say, Your Honor. Under the circumstances of
9 this particular case, under the circumstances of the Govern-
10 ment having acquired the admission of alleged statements
11 of Byron NUTBROWN and under the circumstances of the jury
12 seeing those statements, we feel that ⁱⁿ⁻justice would be
13 worked if this particular evidence were not admitted.
14 And further, without regard to that, we have this way of
15 demonstrating another possibility from statements made by
16 him which would certainly show his state of mind.

17
18 THE COURT: Well, we would let you
19 introduce any statements that would contradict or impeach
20 directly these statements that the Government has put into
21 evidence for the same purpose, but the offer which you have
22 made, I don't see any way that that has any connection with
23 the testimony or the statement of testimony or the written
24 statement of bearing upon the knowledge or awareness that
25 Byron NUTBROWN may have had which would have been available
26
27

HOULE - direct - Greene

1 to the defendant, been available to the defendant and other
2 co-conspirators as far as Count 6 is concerned. I think
3 this is clearly hearsay. I think it and I don't.

4 MR. GRAY: I might also say it opens up
5 a door which we would feel we would have to meet with other
6 persons who spoke to Byron NUTBROWN and how pleased he was at
7 home and things of that sort. Frankly, I don't think the
8 other side of that issue is particularly germane to the
9 central issue in this case.
10

11 MR. GREENE: Well, Your Honor, if in
12 fact Byron NUTBROWN ran away from home and if we don't know
13 where he is and we couldn't bring him here to say that, we
14 have no other way of showing that.

15 THE COURT: Well, I can appreciate that
16 fact, but I think that we can let you show what this girl
17 may have known relative to his home life from her own
18 knowledge, but I don't think we can let you show statements
19 Byron may have made to her. I don't think, I don't think it's
20 permissible.
21

22 MR. GREENE: We have offered all the
23 news we have on the subject, Your Honor.

24 THE COURT: Well, I am going to rule
25 out with this witness and with any other witnesses' state-
26 ments that were made that they don't go to the same subject
27

HOULE - direct - Greene

1 matter as the statements already introduced by the attorneys
2 for the Government as to Count 6.

3 MR. GREENE: Well, a statement that
4 he intended to, quote, get into trouble, would tend to
5 reflect upon that matter, Your Honor.

6 THE COURT: Well, you haven't fixed
7 it.

8 MR. GREENE: It certainly tends to,
9 if it were established or if there were evidence from which
10 one could draw the inference that Byron NUTBROWN III had a
11 state of mind that he wanted to, quote, get into really big
12 trouble, end of quote, then it certainly reflects on why he
13 would be making the statements he made. And therefore,
14 would reflect upon his state, his true state of mind. In
15 other words, he may have been saying something for the purpose
16 of doing what he said he would do, getting into big trouble.

17 THE COURT: Well, unfortunately, I don't
18 see that it's tied in yet. I don't think it's relevant to
19 anything in the case at the present time. We'll let her
20 testify to anything she knows concerning her own knowledge.

21 MR. GREENE: Thank you.

22 (ALL COUNSEL AND REPORTER RESUMED THEIR NORMAL SEATS)

23 DIRECT EXAMINATION CONTINUED BY MR. GREENE:

24 Q. Just for purposes of continuity, Miss HOULE, you did say
25

B. NUTBROWN - cross - Gray

1 A. Yes.

2 Q. And to what officer did you say that?

3 A. My father.

4 Q. Now, Mrs. NUTBROWN, I want to ask you about the circum-
5 stances leading up to that statement. You lived in
6 a house on Granite Street, didn't you?

7 A. Yes, I did.

8 Q. And who lived on the first floor?

9 A. Ken JENKINS.

10 Q. And I believe you have already testified that Mr. JENKINS,
11 is it?

12 A. Yes.

13 Q. And Mr. HARVEY were friends?

14 A. Yes.

15 Q. Did there come a time when Mr. JENKINS and Mr. HARVEY
16 came up to your living quarters on the second floor?

17 A. Yes.

18 Q. And did they tell you anything at that time; did Mr.
19 HARVEY tell you anything at that time?

20 A. Yes.

21 MR. GREENE: Object.

22 THE COURT: No, we're going to take the
23 answer. That was opened by you.

24 MR. GREENE: Beg your pardon?

B. NUTBROWN - cross - Gray

1 THE COURT: We'll take the answer.

2 A. Yes, he did.

3 Q. Will you tell us, please, what was said to you?

4 MR. GREENE: We'll object.

5 THE COURT: We'll take the answer.

6 A. He told me that they had gone into New Hampshire
7 and they got, it was a room full of stuff that they
8 had stolen.
9

10 Q. And what did Mr. HARVEY say he was doing with that
11 stuff they had stolen?

12 A. He had given JENKINS some, he wanted to give me
13 some, they were putting it up in the attic in
14 different places, and I told him I didn't want any
15 of it.
16

17 Q. Did Mr. HARVEY say anything about this place where it
18 was stolen?

19 A. Yes, it was from Sugar Hill in New Hampshire.

20 Q. And did he say anything about an intention he may have
21 had to return there?

22 A. Yes, they were going to return that night.

23 Q. Having learned that, what did you do?

24 A. I called my father and I told him.

25 Q. And did you tell your father that they wanted you to go
26 along with them?
27

B. NUTBROWN - cross - Gray

1 A. Yes, I told my father that I didn't want nothing to
2 do with the stuff. I was talking, say throw it
3 away, and he told me to go to the Barre Police
4 Station, and he went up with me.

5 Q. Your father went with you?

6 A. Yes, my father went with me.

7 Q. And did you go to the Barre Police Station?

8 A. Yes, I did.

9 Q. Did you tell them what you knew about this incident?

10 A. Yes.

11 Q. And after discussions - withdrawn. Did the Barre Police
12 Department and your father advise you that you
13 should go along with this arrangement?

14 A. Yes, he asked me to find the address first, and
15 it was on the box where they had stolen the stuff,
16 and I gave it to them, and they were all going to
17 leave that night at seven o'clock and I told my
18 father that they wanted me to take my car and go down
19 and I did.

20 Q. What did your father tell you?

21 A. He told me that they would watch me, protect me,
22 that the police would.

23 Q. And did you ultimately go to New Hampshire with
24 Mr. HARVEY and Mr. JENKINS?
25
26
27

B. NUTBROWN - cross - Gray

1 A. Yes - not Mr. JENKINS, it was the other one, but yes,
2 I did go.

3 Q. Did you go to the place where the material had been
4 stolen?

5 A. Yes, we went to two different places; one other
6 place they broke in first, then they returned to
7 the other one.

8 Q. And what was the purpose, what was - withdrawn. What
9 was the purpose of returning to the original place?

10 A. They were going to take some more stuff; there was a
11 lot of antique stuff and the first stuff they had
12 taken was twenty-five thousand dollars worth of
13 stuff.

14 Q. And what happened when you and Mr. HARVEY and the
15 other person arrived at the Sugar Hill place?

16 A. We pulled the cars into the place, Ernie went around
17 out back, opened the door and let us in, and we all
18 had gloves on and flashlights that were fixed so
19 you couldn't see the lights, and Shirley and I
20 went upstairs.

21 Q. And were there any law enforcement officers there when
22 you arrived?

23 A. Yes, we were looking around, and I says to her, I
24 says, "What's in this room?" And I opened the door

B. NUTBROWN - cross - Gray

1 and there was a shotgun come right out in our faces
2 and then everything blew up and some of them tried
3 to get away, and then they started to take us
4 downstairs.

5 Q. Was Mr. HARVEY arrested as a result of that?

6 A. Yes, he was downstairs. There was a state trooper
7 down there and he had the gun up to the state
8 trooper's head....

9
10 MR. GRAY: Your Honor, move to strike
11 the last answer.

12 THE COURT: Yes, the last portion may be
13 stricken.

14 Q. And, Mrs. NUTBROWN, as a result of that incident, were
15 you charged with any crime?

16 A. No, they told me I wouldn't be charged with anything
17 because I helped.
18

19 Q. Did you go to New Hampshire with the intention of
20 stealing anything?

21 A. No.

22 Q. As a result of that incident was Mr. HARVEY charged with
23 a crime?

24 A. Yes, he was.
25

26 Q. And do you know whether or not he was convicted of
that crime?

B. NUTBROWN - cross - Gray

A. Yes.

Q. Do you believe Mr. HARVEY has harbored a grudge against you since that time as a result of that?

MR. GREENE: Object.

THE COURT: Sustained.

MR. GRAY: No further questions on that subject, Your Honor.

MR. GREENE: Could we approach the Bench? I would like to approach the Bench briefly.

THE COURT: You may.

MR. GREENE: With the reporter.

(AT THE BENCH OUT OF HEARING OF THE JURY)

MR. GREENE: I not only have we objected to the testimony regarding the gun and where it was held, but also to the question and answer which was heard and well noted by the jury regarding whether or not Mr. HARVEY harbored a grudge since there is no evidence other than that in this case of that matter; said evidence is inflammatory and prejudicial on the grounds of those, both those questions and answers. We want to put on the record at this time, motion for mistrial.

THE COURT: Well, we sustained your objections, and your motion for a mistrial is denied. However, I hope we're not going to go any further.

Bench

1 MR. GRAY: I'm through with it, Your
2 Honor. Just for the record, I simply felt that the way
3 Mr. GREENE had left it, it was unfair to this witness and
4 to...

5 THE COURT: Yes, I think Mr. GREENE
6 left the inference or certainly indicated there was a scheme
7 and I think it was perfectly proper to clear up when and
8 why and how it came about.

9
10 (ALL COUNSEL AND REPORTER RESUMED THEIR NORMAL SEATS)

11 MR. GRAY: Your Honor, the Government has
12 no further questions of Mrs. NUTBROWN.

13 REDIRECT EXAMINATION BY MR. GREENE:

14 Q. Mrs. NUTBROWN, at a later time than the time about which
15 you have just testified, in 1972, '73, didn't you
16 make another statement about another scheme by which
17 you would get Ernie HARVEY?
18

19 A. No.

20 Q. You deny then that you, I believe at your residence,
21 told Officer WEST that you and your brother-in-law
22 had worked on a scheme by which you'd get Ernie
23 HARVEY, and you used those words?
24

25 A. What year was that?

26 Q. Well, what year was it; was it 1972 or 1973?

27 A. When the stuff was thrown into the river, no, it was

B. NUTBROWN - redirect - Greene

no brother-in-law.

1
2 Q. Well, didn't you tell Officer WEST that you and your
3 brother-in-law had devised a scheme?

4 A. No, not my brother-in-law.

5 Q. Well, are you suggesting that perhaps there was another
6 individual with whom you were devising a scheme?

7 A. No, there was no scheme.

8 Q. But you did tell them that there was, didn't you?

9 A. No, there was not a scheme.

10 Q. Now, I'm asking you now just what you told Officer WEST
11 in your house; you told him that you were devising -
12 would you like the word plan - to get Ernie HARVEY
13 in jail?
14

15 A. I said that I'd say that I was with them when they
16 threw the stuff in the river if that's what you call
17 a plan.
18

19 Q. Oh, in other words you're saying that you would say
20 that something was so, but then you told them it
21 wasn't really so?

22 A. That's true, yes, I did.

23 Q. And you said that you would say that to get Ernie HARVEY
24 in jail?

25 A. Yes, but I told them the truth because I couldn't
26 do it.
27

B. NUTBROWN - redirect - Greene

1 Q. You said you were ready to?

2 A. I said I would do it, then I couldn't do it because...

3 Q. As a matter of fact, on that occasion, you first told
4 him a story about what happened - or I'll strike
5 the word story - you first told him something that
6 you said had happened, right?

7 A. Yes, that the stuff was thrown in the river.
8 not

9 Q. And then you said something else I'm/going to tell you
10 until this is all over, right?

11 A. No, I don't remember saying that, no.

12 Q. And then you took him out to your porch and you said,
13 actually that was all a bunch of lies?

14 A. I told him it was lies because I could not do it to
15 him.

16 Q. Okay, but you were ready to lie if you had to?

17 A. No, I couldn't do it to him. I wanted him arrested,
18 yes, but I couldn't do it to him.

19 Q. But you never said...

20 A. I told him the truth, and I went down and took a
21 polygraph, and they asked me if I was lying and I
22 told them the truth.

23 Q. And you deny that you made the statement that...

24 A. (Simultaneous voices) Yes, I did say it, but I also
25 told them the truth. Yes, I told them the truth,

Bench

1 that I couldn't do it.

2 MR. GREENE: May I have just a moment?

3 (AT THE BENCH OUT OF HEARING OF THE JURY)

4 MR. GREENE: First, I want counsel for
5 the Government and the Court to know that I waited between
6 the remark about the polygraph and now a certain period of
7 time so as not to draw attention to it. I believe that
8 the statement, first of all, is inadmissible, but has been
9 heard by the jury and raised an issue which should not have
10 been raised, has prejudiced the jury at this point, and I
11 again, on the grounds that they have heard that statement
12 move number one, for mistrial and number two, in the
13 alternative - strike that. Number one, I move for mistrial
14 on those grounds, and number two, move that in any event,
15 the testimony, the jury be instructed that they are to not
16 consider the matter, but primarily I move for a mistrial on
17 those grounds.
18
19

20 THE COURT: What do you mean not consider
21 the matter? Do you want that portion of the answer stricken?

22 MR. GREENE: Your Honor, I'm trying to
23 come up with alternative means of solving a problem, but
24 I'm going to withdraw the request regarding striking the
25 answer because the jury's heard it. It's in their minds, I
26 believe, and I don't believe any instructions can clear it
27

Bench

1 out. So therefore....

2 THE COURT: Well, how do you claim it's
3 prejudicial?

4 MR. GREENE: It has, first of all,
5 informed the jury that this witness has taken such a test
6 and she claims she passed it. Now, therefore, the jury
7 may draw inferences that this credibility of this witness is
8 therefore been established or rather established the
9 credibility according to the rules and restrictions by the
10 Court. They've already heard it and I don't think they
11 can get it out of their minds. Secondly, by raising the
12 issue, the question is raised whether other people have
13 taken this test and I can not believe that the jury will
14 not think those thoughts and think that others who have
15 not made this announcement must therefore not be telling
16 the truth.
17

18
19 MR. GRAY: Your Honor, in addition to
20 the fact that it was elicited by Mr. GREENE, I don't even
21 know and I'm familiar with the facts of this case, what the
22 polygraph was all about or what event was covered for it,
23 by it. And I can't imagine that the jury knows about, perhaps
24 Mr. GREENE knows about polygraph was taken about the facts
25 in this case. I certainly don't know that to be the case
26 and and I don't think there's any problem whatsoever if he

Bench

1 wishes....

2 THE COURT: It's very vague, it's certain-
3 ly very vague in my mind as to whether this occurred, when
4 this occurred, in 1972 or 1973.

5 MR. GREENE: Well, she referred to the
6 incident of which referred to testimony of throwing things
7 in the river.

8 THE COURT: Well, we don't know that
9 the
10 this is/one time they threw things in the river and
11 apparently might have done this with great frequency.

12 MR. GRAY: Your Honor, I would make a
13 suggestion. We certainly have no intention to refer to the
14 word in our closing arguments, so that it can be considered
15 stricken from the record at least for use in argument if
16 that's any help to the Court. We don't intend to refer to
17 that in any way. If Mr. GREENE is concerned about it, I
18 would suggest that striking it is going to highlight it
19 in...
20

21 MR. GREENE: I agree and that is why
22 I withdrew the request to do that, but my motion stands.

23 THE COURT: We'll deny your motion.

24 (ALL COUNSEL AND REPORTER RESUMED THEIR NORMAL SEATS)

25 MR. GREENE: The Defense rests.

26 THE COURT: Well, just a minute, I think
27

1 through a relatively long trial. And you will be free to
2 go, and the remaining ladies and gentlemen will take the
3 case at this time. We'll stand in recess.

4 (AT 10:35 A.M. THE JURY RETIRED TO THE JURY ROOM TO DELIBERATE
5 UPON THEIR VERDICT)

6 (AT 3:55 P.M. THE JURY RETURNED TO THE COURT ROOM TO DELIVER
7 THEIR VERDICT)

8 THE COURT: All right, Mr. CLERK.

9 THE CLERK: Madam Forelady, has the
10 jury reached a verdict?

11 MRS. NUCEDER: Yes, we have.

12 THE CLERK: What is the verdict of the
13 jury as to Count 1?

14 MRS. NUCEDER: Guilty.

15 THE CLERK: What is the verdict of the
16 jury as to Count 2?

17 MRS. NUCEDER: Guilty.

18 THE CLERK: What is the verdict of the
19 jury as to Count 3?

20 MRS. NUCEDER: Guilty.

21 THE CLERK: What is the verdict of the
22 jury as to Count 4?

23 MRS. NUCEDER: Guilty.

24 THE CLERK: What is the verdict of the
25 jury as to Count 5?

26 MRS. NUCEDER: Guilty.

27 THE CLERK: What is the verdict of the
jury as to Count 6?

1 jury as to Count 6?

2 MRS. NUCEDER: Guilty.

3 THE CLERK: Madam Forelady, do you
4 find that the conspiracy in Count 6 resulted in the death
5 of Byron NUTBROWN III?

6 MRS. NUCEDER: Yes, we do.

7 THE CLERK: Madam Forelady, is this
8 the verdict of the jury?
9

10 MRS. NUCEDER: Yes, it is.

11 THE CLERK: So say you all, ladies and
12 gentlemen?

13 JURORS: Yes.

14 THE COURT: Mr. GREENE, do you wish the
15 jury polled?
16

17 MR. GREENE: Yes, Your Honor, the
18 defendant has requested they be polled.

19 THE COURT: All right.

20 THE CLERK: Mrs. NUCEDER, is this your
21 verdict as to all counts?

22 MRS. NUCEDER: Yes, it is.

23 THE CLERK: Mrs. Shirley BROUILLETTE,
24 is this your verdict as to all counts?
25

26 MRS. BROUILLETTE: Yes.

27 THE CLERK: Mrs. Lorraine LAWRENCE, is

1 this your verdict as to all counts?

2 MRS. LAWRENCE: Yes, it is.

3 THE CLERK: Fernand BENJAMIN, is this
4 your verdict as to all counts?

5 MR. BENJAMIN: Yes.

6 THE CLERK: Mrs. Ruth TERRY, is this
7 your verdict as to all counts?

8 MRS. TERRY: Yes, it is.

9 THE CLERK: Mrs. Lena CYR, is this your
10 verdict as to all counts?

11 MRS. CYR: Yes, it is.

12 THE CLERK: Richard ROGERS, is this
13 your verdict as to all counts?

14 MR. ROGERS: Yes, it is.

15 THE CLERK: Donald SESSIONS, is this
16 your verdict as to all counts?

17 MR. SESSIONS: Yes, it is.

18 THE CLERK: Mrs. Jane KUSS, is this
19 your verdict as to all counts?

20 MRS. KUSS: Yes, it is.

21 THE CLERK: Robert HEBERT, is this your
22 verdict as to all counts?

23 MR. HEBERT: Yes, it is.

24 THE CLERK: Mrs. Ethel MINER, is this
25

1 verdict as to all counts?

2 MRS. MINER: Yes, it is.

3 THE CLERK: William MORRIS, is this
4 your verdict as to all counts?

5 MR. MORRIS: Yes, it is.

6 THE COURT: All right; thank you very
7 much, ladies and gentlemen, for your attention to this matter
8 over the past week, week today. A week ago today we started
9 and it's been a long and difficult case, and we thank you
10 for your very conscientious attention to it.

11 We are starting another case on Wednesday.
12 However, I think I can advise, can I Mr. CLERK, that none
13 of these ladies and gentlemen will be called to serve on
14 that particular case?

15 THE CLERK: That is right, Your Honor.

16 THE COURT: So it will be some of your
17 compatriots who will be in here on Wednesday for the next
18 case.

19 And at this time, we'll excuse you
20 subject to call, and I can't tell you exactly when that will
21 be.

22 We will stand in recess.

23 (THE JURY WAS EXCUSED AND WITHDREW AT 3:57 P.M. ON 28
24 OCTOBER 1974)

Without the Jury

1 MR. GRAY: Thank you, Your Honor.
 2 THE COURT: Is there anything further
 3 either of you gentlemen have?
 4 MR. GRAY: Nothing, Your Honor.
 5 MR. GREENE: Yes, Your Honor, we
 6 do have motions to be made and we don't know if the Court
 7 will make them here or at the Bench or in Chambers.
 8 THE COURT: Well, why don't we take -
 9 no, we'll take them here at this time.
 10 MR. GREENE: Okay. Firstly, at this
 11 time, Your Honor, defendant renews all motions previously
 12 made at the closing of the Government's evidence, and at
 13 the closing of all evidence, for acquittal, dismissal, or
 14 mistrial or any of the above.
 15 The defendant also moves for motion for
 16 acquittal notwithstanding the verdict on each of separate
 17 counts, on the grounds that evidence presented was insuffi-
 18 cient to sustain the conviction and warrant the findings of
 19 guilty by the jury. Also on the grounds that the evidence
 20 was insufficient to establish and prove venue; further, on
 21 the grounds that reasonably jurymen must necessarily have had
 22 a reasonable doubt as to the guilt of the defendant on one
 23 or more of the charges which were brought against him, and
 24 finally, on the grounds that the circumstantial evidence

Without the Jury

1 fails to exclude all other reasonable hypotheses.

2 Shall I proceed or shall we take each
3 motion?

4 THE COURT: Well, is this one motion
5 or two motions you just made?

6 MR. GREENE: Well, I just made two and
7 I'm wondering....

8 THE COURT: Well, each motion is denied
9 as to each and every count.

10 MR. GREENE: Thank you, Your Honor.
11 The next motion, Your Honor, is for a mistrial on the
12 grounds that the jury was not sequestered.

13 THE COURT: Did you ask to have the
14 jury sequestered, Mr. GREENE?

15 MR. GREENE: I believe when we discussed
16 the issue, Your Honor, prior to choosing the jury, that the
17 defendant expressed his wish the jury be sequestered.

18 THE COURT: That motion is denied.

19 MR. GREENE: Next, a motion for mistrial
20 on the grounds that the publicity during the trial may have
21 prejudiced the jury and because they were not sequestered
22 there would be no way of knowing without examining the
23 questions.

24 THE COURT: Well, could you specifically

